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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE CHURCH OF THE DIVINE EARTH

Appellant/Cross-Respondent,

vs.

CITY OF TACOMA,

Respondent/Cross-Appellant.

CITY OF TACOMA'S REPLY BRIEF

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I. Introduction

Through *Appellant's Reply Brief* (hereinafter the "Church Reply"), Appellant/Cross-Respondent Church of the Divine Earth (referenced throughout as the "Church") continues to attempt to rewrite the history of this case. The Church does so in an attempt to convince this Court to invade the province of the trial court, presumably with the assumption that this Court will increase the trial court's discretionary award of attorney's fees and costs. The relief requested by the Church through this appeal is improper and without any support in our jurisdiction's case law. For those reasons, as well as the reasons set out in the *City of Tacoma's Opening/Responsive Brief*, the Respondent/Cross-Appellant City of Tacoma (referenced throughout as the "City") respectfully renews its request that this Court remand one issue to the trial court – requiring the trial court to issue a more substantively meaningful set of Findings of Fact and Conclusions of Law that explain which tasks/hours claimed by

the Church's attorneys are to be compensable. All other aspects of the trial court's decision below should be affirmed.

II. Analysis

A. This is not a civil rights or constitutional case

Through this appeal, the Church continues to attempt to reframe and relitigate the merits of this case. That attempt is improper as the only issue that is presently before this Court relates to the award of the Church's attorney's fees pursuant to Chapter 46.60 RCW. All other issues that were or could have been at play in this matter have been resolved. The record speaks for itself. This Court should decline the Church's invitation to address any issue other than the sufficiency of the trial court's *Findings of Fact and Conclusions of Law* relating to the number of tasks/hours allowed to be factored into the award of attorney's fees and costs.

The Church can scream that the sky is falling until it is hoarse and exhausted; however, the scream does not make the assertion true. Despite that reality, the Church continues to argue

that the case below is a “civil rights” case of constitutional magnitude. *See Church Reply*, § II(A).

It is ironic that the Church argues that it is a miracle that the Washington Supreme Court decided in its favor earlier in these proceedings, yet the Church then argues that the Supreme Court’s decision should be set aside, ignored, or reinterpreted in a way that defies reason as well as the clear language of the Supreme Court’s decision. The Supreme Court’s decision in this matter speaks for itself and its analysis opens by indicating

We should first settle what this case is not about. This is not a case challenging the constitutionality of a land use decision... this is not a claim for just compensation for a taking. Instead, what we have before us is a claim for damages under RCW 64.40.020 for an attempted exaction of land through an unlawful permit condition.

CP 136; *also at* 194 Wn.2d 132, 136, 449 P.3d 269 (2019).

In an effort to contort the Supreme Court’s decision so that the Church can call this matter a “civil rights” case, the Church cites heavily to Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 954 P.2d 250 (1998). *See Church Reply*, at 4-5. The

Church fails to disclose to this Court that Mission Springs involved causes of action in “RCW 64.40 **and 42 U.S.C. § 1983.**” Mission Springs, 134 Wn.2d at 951 [emphasis added]. In the case below, there was never a viable 42 U.S.C. § 1983 claim. In fact, the Church undertook significant efforts to amend its Complaint to add a 42 U.S.C. § 1983 cause of action. *See e.g.*, CP 442-60; 445:11-13. Those efforts included the Church bringing an unsuccessful *Motion for Reconsideration* after the trial court denied the Church’s petition to add that cause of action. *See* CP 516-65, 577. The holding from Mission Springs, and the out-of-state authority it relies on, focuses on 42 U.S.C. § 1983 and on facts that are not present in the matter presently before this Court. *See e.g.*, Mission Springs, at 967 (“...Bateson, like Mission Springs, commenced suit alleging a cause of action for deprivation of his constitutional rights pursuant to 42 U.S.C. § 1983, specifically asserting he had been deprived of his property without due process, and, moreover, that his property had been taken without just compensation.”) Reliance on

Mission Springs is likely problematic in light of the drastic departure that case took from the longstanding Washington State precedent and its questionable reasoning more generally. *See Mission Springs*, dissent beginning at 973.¹

Despite the Church's best efforts to argue to the contrary, this is not – and never was – a “civil rights” case. The Church's

¹ Judge Talmadge, who happens to be the author of “an excellent law review article” (to use the Church's words – *see e.g.*, Church Reply, FN 14) cited by the Church throughout its appellate briefing in this case, authored the dissenting opinion in Mission Springs. Two key excerpts from that dissent follow:

I doubt federal constitutional law is implicated here in the first instance. At worst, the City violated RCW 58.17.170 by its delay in issuing the grading permit. As we stated in Orion Corp. v. State, 109 Wn.2d 621, 652, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022, 108 S. Ct. 1996, 100 L. Ed. 2d 227 (1988), “If our state constitution provides the protection sought, a federal question under the Fourteenth Amendment's due process clause does not arise.” We ought not make a federal case out of it every time somebody disagrees with a local land use decision. Our state constitution does not contain lesser guarantees of due process than the federal constitution. Moreover, RCW 64.40 provides an adequate and speedy remedy for Mission Springs' claims in this case.

Mission Springs, dissent at 985-6.

The majority opinion claims to “follow that overwhelming body of authority which applies Due Process principles to similar factual situations,” Majority op. at 964, but fails to cite the location of even a small portion of “that overwhelming body.” As noted above, substantive due process as a cause of action in cases like the one at bar is a thing of the past in the Ninth Circuit. Moreover, as I have indicated previously, substantive due process claims are extremely difficult to sustain in the other federal circuit courts as well. Sintra, 131 Wn.2d at 684 n.30, 935 P.2d 555 (Talmadge, J., concurring in part, dissenting in part).

Mission Springs, dissent at 989.

argument that this Court should reject argument unsupported by authority in this regard (*see Church Reply*, § II(A)(4)) is perplexing in light of the Supreme Court analyzing the exact issue, in this specific case, and resolving the same with clear and certain language. The City suggests there can be no greater or more specific support than an earlier holding directly on topic from our State's highest court. As confirmed by the Supreme Court, there was no unconstitutional land use decision at play, there was no "taking" without just compensation; it has been settled by the Washington Supreme Court that this matter involves an attempted exaction of land through an unlawful permit condition – nothing more. CP 136; *also at* 194 Wn.2d at 136. It follows that the Church's arguments for a higher attorney's fee award and a multiplier based on this being a "civil rights" case are baseless. Further, this Court need not pass judgment as to whether this is a "civil rights" case if it simply grants the relief requested by the City. The Church will be free

to reiterate its baseless arguments about this being a “civil rights” case to the trial court on remand.

B. Remand is the only appropriate remedy for this appeal

The Church has not presented to this Court any authority that directly supports its position that this Court should invade the province of the trial court by conducting its own analysis of the attorney fee issue. There is, however, robust authority in this jurisdiction that expressly provides that remand is the sole appropriate remedy for this appeal. *See e.g., Mahler v. Szucs*, 1135 Wn.2d 398, 435, 957 P.2d 632 (1998); *Berryman v. Metcalf*, 177 Wn.App. 644, 659-60, 312 P.3d 745 (2013); *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn.App. 409, 416, 157 P.3d 431 (2007); *Taliensen Corp. V. Razore Land Co.*, 135 Wn.App. 106, 147, 144 P.3d 1185 (2006); *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 737 (2016).

Ignoring the overwhelming body of jurisprudence that supports remand, the Church directs this Court to *Lobdell v. Sugar ‘N Spice, Inc.*, in support of its argument that remand is

not the appropriate remedy here. See Church Reply, 16. As argued in the *City of Tacoma's Opening/Responsive Brief*, Lobdell does not support the Church's argument; Division 1 remanded the Lobdell case to the trial court, in part, for "a determination on plaintiff's attorney's fees and costs." Lobdell, 33 Wn.App. 881, 893, 658 P.2d 1267 (1983). That should be the same outcome of this appeal.

The Church Reply, also cites to Bryant v. Joseph, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992); however, the Bryant decision is similarly unhelpful for this Court's analysis on topic. While the Washington Supreme Court held in Bryant that the "Court of Appeals did not err in reviewing the documents in the record in order to determine if the complaints had a factual and legal basis," (Bryant at 222), the appellate court did not calculate the appropriate attorney's fees and costs owed to the prevailing party. That is the issue before this Court. As a result, Bryant does not lend any meaningful support to the Church's argument. Again, there are numerous cases that support the proposition that

it is the “traditional role” of the trial court to determine compensable attorney’s fees and costs. Berryman, 117 Wn.App. at 659-60; *see also* RAP 7.2(i); *see also* supra.

After its arguments to the contrary, the Church seems to concede that remand is the only appropriate next step when it concludes the related argument by stating this Court “should provide clear direction [on] the factors to be applied [by the trial court] when calculating the attorney fees.” Church Reply, 19. The City joins the Church in this request; the City respectfully requests that this Court remand the issue with clear direction to the trial court so that an adequate record can be created.

C. City preserved all issues at play in its Cross Appeal such that they are properly before this Court

The Church attempts to shift the burden to the City by suggesting the City must *support* the trial court’s fee award (Church Reply, § II(C)); this is improper. The Church seems to suggest that the City invited the error below (*see* Id.); that is incorrect.

The proper *appellate court* remedy for inadequate factual findings regarding an attorney fee award is a remand for the trial court to make adequate findings. That is blackletter law in this jurisdiction. *See e.g., Mahler v. Szucs*, 1135 Wn.2d 398, 435, 957 P.2d 632 (1998); *Berryman v. Metcalf*, 177 Wn.App. 644, 659-60, 312 P.3d 745 (2013); *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn.App. 409, 416, 157 P.3d 431 (2007); *Taliensen Corp. V. Razore Land Co.*, 135 Wn.App. 106, 147, 144 P.3d 1185 (2006); *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 737 (2016). There is no related argument that the City could have raised at the trial court level. In fact, the trial court ultimately adopted the *Findings of Fact and Conclusion of Law on Attorney Fees* proposed by the Church, with slight modification. CP 180-86 (the first proposed Findings and Conclusions from the Church); CP 382-88 (the second proposed Findings and Conclusions); *compare* CP 418-423 (the Findings and Conclusions entered by the trial court). As the Church was the prevailing party on the issue, it held the responsibility to procure

findings of fact. *See e.g.*, Noll v. Special Elec. Co., 9 Wn. App. 2d 317, 323, 444 P.3d 33, 36 (2019) *citing* Peoples Nat'l Bank v. Birney's Enters., Inc., 54 Wn. App. 668, 670, 775 P.2d 466 (1989).

“Although the obligation is placed on the trial judge to enter the findings, **[the Washington Courts] recognize the near universal practice of delegating the drafting of findings to the prevailing party.**” State v. Yallup, 3 Wn.App. 2d 546, 555, 416 P.3d 1250 (2018) [emphasis added]. **“The prevailing party must make efforts to get findings entered in a manner that facilitates timely review of an appeal.** Although the ultimate responsibility rests with a trial judge, the reality is that the prevailing party has the most at risk and should make sure that a busy trial judge is presented with the opportunity to enter appropriate findings in a timely manner.” Id., at 556 [emphasis added]. When the prevailing party does not do so, the appellant should alert the respondent to the problem. Id., at 556-57. “Basic principles of civility and professionalism dictate that all counsel

should attempt to resolve problems before they grow into bigger issues.” Id., at 557.

It is the Church that played the leading role in there being inadequate findings to support the attorney fee award; not the City. Instead of attempting to correct the issue below, the Church brings this appeal in an effort to secure a higher fee award directly from this Court. Despite the Church’s suggestion otherwise, without an adequate record of the trial court’s analysis in calculating the fee award, remand is the only option for this Court. This Court’s earlier analysis set out in Just Dirt, Inc. v. Knight Excavating, Inc., should control:

[T]rial courts must exercise their discretion on articulable grounds, making an adequate record so the appellate court can review a fee award. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). Further, the trial court must enter findings of fact and conclusions of law to support an attorney fee award. Mahler, 135 Wn.2d at 435. “[A]bsence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record.” Mahler, 135 Wn.2d at 435.

Just Dirt also argues that the trial court's failure to enter written findings of fact is a clerical error that Knight failed to cure under CR 60(a). Again, we disagree with Just Dirt's reasoning. **It is Just Dirt's duty as the prevailing party to procure formal written findings supporting its position, and it must “abide the consequences” of its failure to fulfill that duty.** Peoples Nat'l Bank of Wash. v. Birney's Enters., Inc., 54 Wn. App. 668, 670, 775 P.2d 466 (1989).

Absent an adequate record for us to review the fee award, we must remand for further proceedings. But because an attorney fee award, if any, must be based on proper grounds, we discuss the grounds previously raised before the trial court.

Just Dirt, 138 Wn.App. 409, 415-16, 157 P.3d 431, 435 (2007)

[emphasis added].

At the trial court level, the City objected to the Church's fee request by opposing the *Church's Motion for Attorney Fees and Expenses*. CP 333-373. The City argued that a fee award is discretionary (CP 336), that the trial court can adjust the lodestar fee upward or downward (CP 336), the trial court will be found to abuse its discretion when its decision is manifestly unreasonable or based on untenable grounds or if no reasonable

person would take the position adopted by the trial court (CP 336), the trial court must make an independent decision as to what is a reasonable fee award (CP 337), and the Church failed to bear the burden of establishing that all its requested fees are compensable (CP 339). All these arguments are sufficient to preserve the City's request for remand through its Cross Appeal. Even if this Court agrees with the Church that the City did not adequately preserve this issue for its Cross Appeal, it does not change the outcome of this appeal. As set out above and in the *City of Tacoma's Opening/Responsive Brief*, this issue is well established by blackletter law – if this Court agrees that the record is inadequate to support the trial court's fee award, the only outcome of this appeal is a remand so that adequate findings can be made.

D. Trial court had discretion to adjust Lodestar method

The Church suggests that the City misunderstands the lodestar method. Church Reply, § II(D). While the City disagrees

with the Church's suggestion, any related argument is misplaced in this appeal.

The parties agree that this jurisdiction's case law on point provides that a trial court can adjust the prevailing party's suggested lodestar amount down. Church Reply, 29; *see also* Scott Fetzer, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993) ("A lodestar figure that 'grossly exceeds' the amount in controversy 'should suggest a downward adjustment' even where other subjective factors in the case might tend to imply an upward adjustment."); Berryman v. Metcalf, 177 Wn.App. 644, 661, 312 P.3d 745 (2013). The trial court below advised during its verbal ruling as to some of the reasons why it awarded an amount below the Church's suggested lodestar calculation – e.g., the hourly rate was "a bit high" and the case was not complicated. VRP (March 5, 2021), 3-4. Additional arguments against the Church's requested fee award were set out in the City's briefing in opposition to the *Church's Motion for Attorney Fees and Expenses*. CP 333-373. While the trial court could properly

exercise its discretion in reducing the overall lodestar award from that requested by the Church, the trial court needed to provide adequate explanation of its analysis - to include an explanation as to which time entries were deemed compensable. That is the defect that must be remedied on remand.

The City suggests that the parties agree that remand is appropriate here; however, the Church indicates that it disagrees. Church Reply, 1 (Church suggests that the City made the “incorrect assertion that both parties agree that the fee calculation should be remanded.”). The disagreement is perplexing first, because of the clear legal precedence, and, second, because the Church’s briefing suggests in several places that remand is appropriate. *See e.g.*, Church Reply, 26 (“Trial courts must create an adequate record for review of fee award decisions. Failure to create an adequate record will result in a remand of the award to the trial court to develop such a record.”); *compare* Church Reply, 29 (“... the Trial Court erred... in its overall failure to adequately explain its calculations...”). The City suggests that

when the longstanding blackletter law on topic is applied to the facts in this record (and the Church's own arguments), the only proper outcome is a remand for the entry of more detailed Findings as to which of the hours claimed by the Church's attorneys are to be allowed in the fee award.

III. Conclusion

The trial court adequately supported all its *Findings of Fact and Conclusions of Law*, save for Findings of Fact 18, 19, 20 and Legal Conclusion 5 – as those relate to the attorney's hours deemed compensable in relation to the Church's Chapter 46.60 RCW cause of action. That issue – and that issue alone – should be remanded to the trial court. This Court should decline the Church's invitation to invade the province of the trial court by conducting this analysis directly. All other aspects of the trial court's decision should be affirmed – including the hourly rate, the denial of a multiplier, and the denial of the compensability of Mr. Kuehn's alleged legal assistant work. In the event that this Court agrees with the City in these respects – thereby rejecting

the Church's numerous other assignments of error, the City must be deemed the prevailing party at this appeal in relative terms and it should, therefore, be awarded its fees incurred through the appeal. RAP 18.1 and RCW 64.40.020(2).

VI. Certificate

Pursuant to RAP 18.17(b), the undersigned certifies that this Reply Brief (excluding the caption, table of contents, table of authorities, this certification, the signature block, and any language below) contains 3,602 words.

RESPECTFULLY SUBMITTED this 22nd day of July,
2022.

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I, Barret J. Schulze, declare under penalty of perjury and pursuant to the laws of the State of Washington that the foregoing is true and correct.

Signed in Tacoma, Washington on July 22nd, 2022.

/s/ *Barret Schulze*
BARRET J. SCHULZE

DECLARATION OF SERVICE

I hereby certify that on July 22, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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